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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TWENTIETH CENTURY FOX FILM CORP., et al., Plaintiffs, v. CABLEVISION SYSTEMS CORP., et al., Defendants.	:	06 Civ. 3990 (DC)
CABLEVISION SYSTEMS CORP., et al., Counterclaim-Plaintiffs, v. TWENTIETH CENTURY FOX FILM CORP., et al., Counterclaim-Defendants.	:	
THE CARTOON NETWORK LP, LLLP, et al., Plaintiffs, v. CSC HOLDINGS, INC., et al., Defendants.	:	06 Civ. 4092 (DC)
CABLEVISION SYSTEMS CORP., et al., Counterclaim-Plaintiffs, v. THE CARTOON NETWORK LP, LLLP, et al., Counterclaim-Defendants.	:	**MEMORANDUM OF LAW IN OPPOSITION TO ALL PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**
CABLEVISION SYSTEMS CORP., et al., Third-Party-Plaintiffs, v. TURNER BROADCASTING SYSTEM, INC., et al., Third-Party-Defendants.	:	

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 6

I. PLAINTIFFS' ATTEMPT TO HOLD CABLEVISION DIRECTLY LIABLE FOR COPYING THEIR PROGRAMMING FAILS AS A MATTER OF LAW 6

A. Plaintiffs Falsely Portray the RS-DVR Subscriber as Minimally Involved in Copying 7

B. Cablevision's Oversight of the RS-DVR System Does Not Mean that It is Actively Engaged in Copying 13

C. Cablevision Does Not Become Directly Responsible for Customer Copy Decisions Because of its Role as a Cable Operator 15

II. THE UNDISPUTED FACTS AND CONTROLLING LEGAL PRINCIPLES FORECLOSE PLAINTIFFS' CLAIM OF DIRECT "PUBLIC PERFORMANCE" LIABILITY 17

A. Plaintiffs Misapply the Law as to What it Means to be Engaged in a Performance 18

B. Transmissions Resulting From Customer Use of the RS-DVR Are Fundamentally Private 20

1. The Fact that Cablevision Has a Commercial Relationship With Customers Does Not Make RS-DVR Transmissions Public 20

2. In Respects Relevant to the Copyright Act, RS-DVR Is Different From VOD 24

3. The Fox Plaintiffs' Reliance On Sections 111 and 114 of the Copyright Act Is Misplaced Because This Case Involves Neither A Compulsory License Nor Sound Recordings 29

III. OTHER ARGUMENTS ASSERTED BY TURNER PLAINTIFFS BUT NOT BY THE MAJORITY OF PLAINTIFFS IN THIS CASE 31

A. Plaintiffs Fail To Establish a Copyright Claim Based On the Transitory Buffering of Minute Bits of Programming Data Associated with the RS-DVR 31

B. RS-DVR Does Not Involve "Distribution" Under The Copyright Act. 35

C. Prior Versions of Product Offering and Other Things Cablevision Could Do with RS-DVR Are Irrelevant 37

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.,
845 F. Supp. 356 (E.D. Va. 1994) 34

Agee v. Paramount Commc'ns, Inc.
59 F.3d 317 (2d Cir. 1995) 36

Basic Books, Inc. v. Kinko's Graphics Corp.,
758 F. Supp. 1522 (S.D.N.Y. 1991) 9, 10 n.3

Co-Star Group, Inc. v. Loopnet, Inc.,
373 F.3d 544 (4th Cir. 2004) .... *Passim*

Columbia Pictures Indus., Inc. v. Aveco, Inc.,
800 F.2d 59 (3d Cir. 1986) 21, 22

Columbia Pictures Indus., Inc. v. Redd Horne, Inc.,
749 F.2d 154 (3d Cir. 1984) 21, 22, 27

David v. Showtime/The Movie Channel, Inc.,
697 F. Supp. 725 (S.D.N.Y. 1988) 28, 29

Davis v. Gap, Inc.,
246 F.3d 152 (2d Cir. 2001) 35

Elektra Records Co. v. Gem Elec. Distribs., Inc.,
360 F. Supp 821 (E.D.N.Y. 1973) 12 n.4

Ford Motor Co. v. Summit Motor Products, Inc.,
930 F.2d 277 (3d Cir. 1991) 36

Infinity Broad. Corp. v. Kirkwood,
50 F.3d 104 (2d Cir. 1998) 27, 28

Infinity Broad. Corp. v. Kirkwood,
965 F. Supp. 553 (S.D.N.Y. 1997) 28

Knickerbocker Toy Co. v. Azrak-Hamway Int'l, Inc.,
668 F.2d 699 (2d Cir. 1982) 35

MAI Sys. Corp. v. Peak Computer, Inc.,
991 F.2d 511 (9th Cir. 1993) 33

Marks v. Leo Feist, Inc.,
290 F. 959 (2d Cir. 1923) 35

Marobie-Fl, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.,
983 F. Supp. 1167 (N.D. Ill. 1997) 10, 18, 37 n.17

Nat'l Football League v. Primetime 24 Joint Venture,
211 F.3d 10 (2d Cir. 2000) 28

New York Times Co. v. Tasini,
533 U.S. 483 (2001) 12 n.4

On Command Video Corp. v. Columbia Pictures Indus.,
777 F. Supp. 787 (N.D. Cal. 1991) 19, 22, 25

Princeton Univ. Press v. Mich. Document Servs.,
99 F.3d 1381 (6th Cir. 1996) (en banc) 9, 10

RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.,
845 F.2d 773 (8th Cir. 1998) 11, 12

RCA Records v. All-Fast Systems, Inc.,
594 F. Supp. 335 (S.D.N.Y. 1984) 11

Religious Tech. Center v. Netcom Online Commc'ns System,
907 F. Supp. 1361 (N.D. Cal. 1995) .... *Passim*

Ringgold v. Black Entm't Group, Inc.,
126 F.3d 70 (2d Cir. 1997) 35

Sandoval v. New Line Cinema Corp.,
147 F.3d 215 (2d Cir. 1998) 35

Sony Corp. of Am. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 2

UMG Recordings, Inc. v. MP3.com, Inc.,
92 F. Supp. 2d 349 (S.D.N.Y. 2000) ("*MP3.com*") 10

Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.,
192 F. Supp. 2d 321 (D.N.J. 2002), *aff'd* 342 F.3d 191 (3d Cir. 2003) 22

Video Views, Inc v. Studio 21, Ltd.,
925 F.2d 1010 (7th Cir. 1991) 21, 22

Warner Bros. v. ABC,
720 F.2d 231 (2d Cir. 1983) 35

Statutes

17 U.S.C. § 101 .... *Passim*

17 U.S.C. § 106 .... 7, 17, 36

17 U.S.C. § 111 30

17 U.S.C. § 114 30

47 U.S.C. § 534 .... 16 n.8

Other Authorities

Regulations and Legislative History

47 C.F.R. § 76.55-76.57 .... 16 n.8

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1975), *reprinted in* 1976 U.S.C.C.A.N. 5659 .... 30 n.13, 32, 36

Treatises

3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 12.04[A] (2006) 12 n.4

2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[A] (1993) 36

2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.14[C] (1993) 23, 26

2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.18[B] (1993) 30 n.13

Articles

M. David Dobbins, *Computer Bulletin Board Operator Liability for Users' Infringing Acts*, 94 MICH. L. REV. 217, 241 (1995) 12 n.4

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PUBLIC FILING VERSION

Defendants, counterclaim-plaintiffs, and third-party-plaintiffs Cablevision Systems Corp. and CSC Holdings, Inc. (collectively, "Cablevision" or "Defendants") hereby submit this memorandum in opposition to the motions for summary judgment filed in this action by plaintiffs, counterclaim-defendants, and third-party-defendants Twentieth Century Fox Film Corporation, Universal City Studios Productions LLLP, Paramount Pictures Corporation, Disney Enterprises, Inc., CBS Broadcasting Inc., American Broadcasting Companies, Inc., NBC Studios, Inc. (collectively "the Fox Plaintiffs"); and Cable News Network LP, LLLP, The Cartoon Network LP, LLLP, Turner Broadcasting System, Inc., Turner Network Sales, Inc., Turner Classic Movies LP, LLLP, and Turner Network Television LP, LLLP (collectively "the Turner Plaintiffs") on all counts of the complaints, counterclaims, and third-party claims filed in the actions numbered C.A. No. 06 Civ. 3990 (DC) and C.A. No. 06 Civ. 4092 (DC). Unless specified as either "the Fox Plaintiffs" or "the Turner Plaintiffs," references to "plaintiffs" herein shall collectively refer to all plaintiffs in both actions.

INTRODUCTION

Plaintiffs' cross motions for summary judgment must be denied. In short, plaintiffs cannot succeed on their motions for summary judgment that Cablevision *directly* infringes their copyrights by providing its customers with the Remote Storage Digital Video Recorder ("RS-DVR"), because Cablevision is not making the copies in question nor is it engaged in a "public" performance; instead, Cablevision is merely supplying machinery and technology that its customers use to record their own unique copies, and to play back those unique copies in their own home. Under well established law, Cablevision cannot be held directly liable for supplying equipment used by consumers to copy, nor is it engaged in unauthorized "public performances" when such equipment facilitates the retrieval of private copies for playback by the subscriber who made them.[1]

Cablevision's position in this case rests on several fundamental principles, which plaintiffs for the most part ignore:

First, in its seminal decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court held that a consumer does not violate the copyright laws when he or she records copyrighted television programs for later personal viewing ("time-shifting"). The Court went on to hold, separately, that Sony was not indirectly liable for *providing* its Betamax machine to consumers for them to use to make copies (even if the machine could be used to make unauthorized copies).

Second, and no doubt as a result of *Sony*, plaintiffs raise only claims of *direct* infringement. Importantly, they do not accuse Cablevision of *indirect* infringement -- that is, plaintiffs do not allege that Cablevision will be responsible for illicit copying being done by *customers* using RS-DVR. Under the Copyright Act, direct liability requires that the defendant actually "do" the act in question; supplying a machine used by others to infringe copyright does not give rise to direct copyright liability. This principle is reflected in the *Sony* litigation itself (the district court in that case specifically rejected claims that Sony was a direct infringer), and has been repeatedly applied in factually analogous circumstances, in cases such as *Religious Technology Center v. Netcom Communication System*, 907 F. Supp. 1361 (E.D. Cal. 1995), and *CoStar Group, Inc. v. LoopNet, Inc.* 373 F.3d 544 (4th Cir. 2004). Those cases hold that internet service providers that act passively in allowing consumers to copy and transmit copyrighted content using their servers cannot be held directly liable under the copyright laws.

Third, plaintiffs' claims here must be viewed through the prism of their own treatment of

[1] The reasons for this are set forth as well in Defendants' Memorandum in Support of Their Motion for Summary Judgment, only parts of which will be repeated here.

traditional set-top storage DVRs (STS-DVRs), which are currently in widespread use. Cablevision has provided STS-DVRs to customers for years. Cablevision owns and maintains these machines, and installs them in the homes of its customers. STS-DVRs allow cable customers, by pressing buttons on their in-home remote control, to choose what programming they wish to record from among the cable programming supplied by Cablevision, to have it recorded and stored, and to play it back later at a time of their own choosing. The recording and playback functionality available to the STS-DVR customer is essentially identical to the RS-DVR. Nevertheless, plaintiffs have never challenged traditional STS-DVRs under the copyright laws, nor have they claimed that Cablevision is somehow "misusing" its licenses from programmers by providing and installing STS-DVRs in its customer's homes.

Plaintiffs' claims for direct infringement are thus contradicted by the central indisputable facts (1) that the copies at issue -- while made *with* Cablevision equipment provided and maintained by Cablevision -- will be made *by* Cablevision subscribers, solely at the initiation and direction of subscribers, for their own personal and exclusive use; and (2) that playback on the RS-DVR consists of a single subscriber retrieving and viewing recordings he created and which can be viewed only by him, within his own home.

With respect to their claims of unlawful "copying," plaintiffs attempt to avoid the import of the above principles by falsely characterizing the subscriber as a mere "button-pusher," while simultaneously exaggerating Cablevision's role in the RS-DVR recording process. This attempt fails. First, the plain facts are that the *customer* is directing the machine -- he or she chooses what to record and when, which the machinery then implements automatically. As shown by both the copyright statute and the case law, these are the critical facts in determining direct infringement; with respect to a statute that forbids unauthorized "reproduction," the person who decides whether to copy protected material for his own exclusive use, and who initiates and controls the copying process is no "minor" player (as the plaintiffs claim), even if the decisions are implemented by pushing a button. It could equally be said that the user of a Betamax or a self-service photocopier is "merely" pushing a button to effect copying, but in each of these contexts it is entirely clear under the law that the consumer is doing the copying, notwithstanding that Sony designed, and copyshops such as Kinko's provides for use on its premises, copy equipment that allows for copying at the push of a button.

In addition, the cases also demonstrate that it is immaterial that Cablevision physically maintains the RS-DVR (much as it maintains STS-DVRs), or that Cablevision plays a role in determining the universe of content that it carries on its network; what is critical is that Cablevision is entirely passive with respect *to the recording processing itself* -- with RS-DVR, like STS-DVRs, *all* linear channels carried on Cablevision's cable system are available for customer recording, and *the customer alone decides what programs to record.* Cablevision does not deny that providing the means by which infringing copies are made can subject a defendant to *indirect* liability under the Copyright Act. Rather, Cablevision's position -- which is solidly supported by statutory language and well-established case law -- is that those considerations cannot, as a matter of law, give rise to *direct* infringement liability.

Plaintiffs alternatively argue that if the Court is unwilling to depart from the settled (and entirely correct) construction of the Act's reproduction provision, it should hold Cablevision liable for directly infringing on their right of public performance in connection with the playback of programming with RS-DVR. This argument fares no better. Indeed, the obstacles to plaintiffs' reading of that clause are largely the same ones standing in the way of their reinterpretation of the reproduction right: plain statutory language, settled precedent, and common sense.

For starters, plaintiffs simply prefer not to discuss the *Netcom* line of cases, which firmly establish that direct liability cannot be imposed for transmissions when the defendant is a passive provider of machinery used by consumers. Even if RS-DVR involves Cablevision being actively engaged in performing, it clearly does not involve "public" performances. It is hard to imagine something that less resembles a "public performance" than an individual using a machine to retrieve a single unique copy, that he recorded and that only his cable box is capable of retrieving, for the exclusive purpose of viewing it in the quintessentially private place -- his home. To avoid the nearly inescapable conclusion that the facts of this case are antithetical to any of those Congress intended to cover when it created the "public performance" right, plaintiffs aggressively reinterpret various public performance cases, concluding that a "public" performance actually means any "transmission within the context of a commercial relationship." This theory cannot withstand scrutiny -- not only because it plainly contradicts Congressional intent, but also because it depends on a misreading of the cases that appear to lend it support. No case cited by plaintiffs (and no case of which we are aware) holds that transmissions that are capable of being received by only one member of the public are "public" simply because the recipient is a paying customer.

Even as they deride as "mantra" (though they do not refute) Cablevision's demonstration of the essential similarity of RS-DVR and STS-DVR, plaintiffs offer a mantra of their own: that RS-DVR is just like video on demand ("VOD"). Based on the undisputed facts and the settled legal principles, the assertion is false. While the difference between RS-DVR and STS-DVR is imperceptible to the subscriber, the difference between VOD, on the one hand, and STS-DVR and RS-DVR, on the other hand, is self-evident. With VOD, a cable operator-procured copy is generally available for viewing by VOD subscribers and hence accessible "to the public"; with STS-DVR and RS-DVR, the subscriber views a private copy that he recorded and is accessible to no other subscriber. Cases and arguments dealing with "VOD" systems are therefore entirely inapposite.

The Turner plaintiffs' alternative argument that RS-DVR "could have been" like VOD -- but has been "artificially" limited -- is, if possible, even more ill-considered. It is axiomatic that this Court must render a decision based on RS-DVR as it has been developed by Cablevision, not as it "could" have been. Moreover, it is a perverse notion that liability should be imposed *because* a party with copyright principles in mind has limited the functionality of a technology it has developed.

Finally, in apparent recognition that the "simple" case they sought to present is untenable, plaintiffs devote a surprising percentage of their memoranda to provisions of the Copyright Act they have never claimed are violated (such as the distribution right); to ones that are wholly irrelevant (such as those governing sound recording and compulsory licensing); and to highly technical arguments (such as that the RS-DVR makes additional "copies" because, in performing its ordinary data processing, it "buffers" small fragments of television programs for fractions of a second). As discussed below, these miscellaneous arguments are wrong on their own terms and provide no support for plaintiffs' direct liability claims.

ARGUMENT

I. PLAINTIFFS' ATTEMPT TO HOLD CABLEVISION DIRECTLY LIABLE FOR COPYING THEIR PROGRAMMING FAILS AS A MATTER OF LAW.

As discussed at length in Cablevision's memorandum in support of its motion for summary judgment, it is well settled that a party that merely provides consumers with machinery that they use to make copies is not itself a direct infringer -- whether that company is selling a

Betamax, leasing an STS-DVR, providing a self-service photocopier, or operating an Internet-based automatic storage and transmission facility. *See* Cablevision's Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Cablevision Mem.") at 13-27. In such situations, the consumer, as the party making the copies, is the potential *direct* infringer, while the party that supplies the recording equipment is at most *indirectly* liable for any infringing copies the consumer makes. This is because section 106 of the Copyright Act is cast in terms of the copyright owner's exclusive rights "to do" certain activities. *See* 17 U.S.C. § 106 (2006) ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights *to do* and to authorize any of the following: . . .") (emphasis added)). Accordingly, courts have repeatedly held that a party must actively engage in one or more of the protected activities to directly infringe one of the Section 106 rights. *See* Cablevision Mem. at 12-13.

Plaintiffs do not contest this elemental principle that a company cannot be directly liable for copying based on providing recording equipment to consumers. Nor did they dispute that RS-DVR enables a subscriber to play back for later viewing only programming that *the subscriber* has elected to record, just as with an STS-DVR. Consequently, as a matter of law, with RS-DVR, as with STS-DVR, the subscriber does the copying, not Cablevision, and Cablevision cannot be deemed to be directly infringing upon plaintiffs' reproduction rights.

A. *Plaintiffs Falsely Portray the RS-DVR Subscriber as Minimally Involved in Copying.*

Plaintiffs claim that direct liability for copying should be imposed on Cablevision because RS-DVR customers supposedly perform a "minimal" role in the copying at issue. The Fox Plaintiffs state:

> Cablevision's subscribers do nothing more than push a button on a Cablevision-supplied remote control to request that a program be copied and then retransmitted at a time of their choosing. This minimal involvement stands in stark contrast to the substantial role that Cablevision plays ....

Twentieth Century Fox Film Corporation, *et al.* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, dated August 25, 2006 ("Fox Mem.") at 17 (emphasis added); *see also* The Cartoon Network LP, LLLP, *et al.* Memorandum of Law in Support of Turner's Motion for Summary Judgment, dated August 25, 2006 ("Turner Mem.") at 13 ("Cablevision's support for its arguments hangs on a single fact: the subscriber uses a remote control to request that Cablevision copy a particular program.").

Plaintiffs' attempt to characterize the RS-DVR subscriber as a mere button-pusher drastically underplays the customer's role in the copying process, as well as the legal impact of that role. With RS-DVR, the subscriber alone exercises volition in the copy process *by affirmatively deciding to record programming, choosing what programming to record, and performing a series of manual steps to effectuate the copying.* Declaration of Abigail Hemani ("Hemani Decl."), Ex. A, Declaration of Stephanie Mitchko in Support of Defendants' Motion of Summary Judgment ("Mitchko Decl.") ¶ 6; Hemani Decl., Ex. B, Deposition of Stephanie Mitchko, dated July 11, 2006 and July 12, 2006 ("Mitchko Dep.") 14:21–15:2. It simply defies common sense to depict the subscriber using RS-DVR as merely "push[ing] a button," because the RS-DVR subscriber initiates and controls the copying process. By contrast, it is a matter of complete indifference to Cablevision whether any particular program is ever copied.

Indeed, the "button-pusher" description could apply equally to the user of a Betamax, a self-service photocopier, or a set-top an STS-DVR. In each circumstance, the manufacturer has designed a complex machine that makes copies in response to the user's "mere" push of a button. With such machines, the user's role involves the volitional act of deciding to make copies, choosing the material to be copied, and the physical act of pushing the button that initiates the machine's operation. Notwithstanding the fact that the user's physical acts are much more simple than the complicated, internal workings of the copy machinery, no one -- not even plaintiffs -- denies that, within the meaning of the Copyright Act, the user does the copying in these situations, while the company that provides the recording equipment does not. That is precisely because the human act that directly causes the machine to make a copy *is* a significant one for purposes of assigning direct responsibility for copying under the Copyright Act, whereas the machine owner's enabling, facilitating, or encouraging another's copying at most provides a basis for imposing indirect liability on the owner.

Plaintiffs seek to overcome these well-established principles of Copyright law by citing a series of cases that they claim stand for the proposition that a party is directly liable for making copies at another's "request."[2] *See, e.g.,* Turner Mem. at 14 (citing *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) and *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1385-91 (6th Cir. 1996) (en banc) as establishing that "[b]usinesses that fulfill requests for unauthorized copies cannot avoid liability for infringement"); Fox Mem. at 17 (citing same cases). However, all of the cases cited by plaintiffs involve situations in which employees of the defendant actually "did" the copying and thus are inapposite to this case.

For example, in *Kinko's* and *Princeton Univ. Press* (the "coursepack cases"), the courts addressed cases where copyshops made copies of portions of copyrighted course materials and combined them into "coursepacks" to sell to students. *Kinko's*, 758 F. Supp. at 1526; *Princeton Univ. Press*, 99 F.3d at 1383. While professors determined what materials were to be included,

[2] Plaintiffs do not explain why they describe the same actions -- pushing the "record" button on exactly the same model remote control -- to create a copy that may later be viewed (by pushing another button on the remote control unit) -- as a "direction" where a set-top DVR is involved, but as a (mere) "request" with respect to RS-DVR. *Compare* Turner Mem. at 6 ("[t]he user *directs* the DVR to record programming....") (emphasis added) *id.*, p. 7 ("[T]he user *directs* the DVR to play back the copied program . . .") (emphasis added) *with* Fox Mem. at 1, 4, 17, 20 (using "request" in the context of RS-DVR); Turner Mem. at 9, 13, 19 (same)).

the copyshops' employees used the machines to make the copies -- *i.e.*, they were standing over the machines, pushing the papers in, and hitting the copy button (and so, for example, could decide in any particular instance *not* to make a given copy). These actions were sufficient for direct liability.[3] By contrast, when Kinko's supplies a machine for self-service copies, it is clear that it cannot be held directly liable for its customer's unauthorized copying -- even though Kinko's owns and maintains the machine, and even though the copy is made on Kinko's premises -- although the customer does nothing more than "push a button." *See, e.g., Netcom*, 907 F. Supp. at 1369; *Marobie-Fl., Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997). Put simply, the relevant question is not who is "requesting" that copies be made; the question is who is *doing* the copying.

No more tenable is the Fox Plaintiffs' reading of *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) ("*MP3.com*"). In that case, the defendant purchased tens of thousands of copyrighted CDs "and, without authorization, copied their recordings onto its computer servers." *MP3.com*, 92 F. Supp. 2d at 350. MP3.com then offered to stream those unauthorized copies to subscribers who could prove that they already owned the CD in question. *Id.* Holding that *MP3.com* was directly infringing based on its act of loading the CDs into its servers, the court wrote, "[I]n actuality defendant is re-playing . . . converted versions of the recordings *it copied*, without authorization, from plaintiffs' copyrighted CDs." *Id.* (emphasis added). The defendant in that case obviously could not claim that its customers were doing the copying, because the custodians played no role in the process whatsoever -- the defendant copied the entirety of songs onto its servers, on its own volition and without any subscriber command. *Id.* In fact, the Fox Plaintiffs concede that "the defendant in MP3.com made copies of the sound

[3] It is also worth noting that in *Kinko's*, Kinko's affixed its logo to the cover page of the course packets, literally branding them as "Kinko's Copies." *Kinko's*, 758 F. Supp. at 1528.

recordings before being requested to do so." Fox Mem. at 17. However, they claim this difference is "immaterial" because a party is liable for making unauthorized copies regardless of whether the copies were made before or after a specific request for them was made. *Id.* To say this is to fundamentally misconstrue the issue presented in this case. A copy made before -- and without regard to whether -- a consumer is involved in the copy process could *never* be copying *by* the consumer. By contrast, copying directly caused by the consumer is *consumer copying.* Consequently, the Fox Plaintiffs' assertion that the facts of *MP3.com* are "directly analogous" to RS-DVR (Fox Mem. at 16) is unsupportable: as in the coursepack cases, MP3.com was held to be liable because it actually *did* the copying at issue.

Nor do the decisions involving in-store sound recording equipment offer any genuine support for plaintiffs' position. *See* Fox Mem. at 17; Turner Mem. at 14. In these cases, the store owner was found directly liable for copying not, as plaintiffs suggest, because *its machines* were making copies "at the request of" customers, but rather because *its employees* were actively engaged in copying. Thus, the court in *RCA Records v. All-Fast Systems, Inc.*, 594 F. Supp. 335 (S.D.N.Y. 1984), explained that the plaintiffs' undercover investigators had asked a salesperson to use an in-store cassette duplicating ("Rezound") machine to make a copy, and "*the salesperson* promptly made a monaural copy of the original tape using the Rezound machine." *RCA Records,* 594 F. Supp. at 337 (emphasis added). The court concluded that "defendant's employees willingly and knowingly copied copyrighted tapes *for* plaintiffs' investigators." *Id.* at 338 (emphasis added). Likewise, in *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988), investigators feigned ignorance as to how to use the Rezound machine "in order to persuade the clerk to do as much of the copying as possible." *RCA/Ariola*, 845 F.2d at 779. The court explained that it need not reach the question whether there would have been a copyright violation had the stores merely provided machines and blank tapes, because the "obvious" basis for imposing liability on the stores was that their employees "actively assisted" in the copying and "helped the customers copy a whole tape." *Id.* at 779, 781. Put simply, these cases, like the coursepack cases and *MP3.com*, turned heavily on the fact that the *store's employees*, not simply the store's *machines*, were "actively" engaged in copying.[4]

In sum, the proposition that a third party's "request" does not preclude imposition of direct liability on a party that actively engaged in copying has no relevance here. Rather, the issue on which this case turns is who is actively engaged in -- and thus is directly liable for -- copying involving the RS-DVR machinery: the subscriber who uses it to record programming, or Cablevision, who designed and oversees the equipment.[5] As demonstrated in Cablevision's Memorandum in support of its own summary judgment motion, when a company provides a consumer with access to recording machinery, and the consumer sets the machinery in motion to

[4] *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973), also cited by plaintiffs, similarly fails to support plaintiffs' argument. In that case, customers used store-provided *Elektra Records,* duplicating machines to make unauthorized copies of copyrighted sound recordings also provided by the stores. 360 F. Supp. at 822. Without deciding the role played in the taping by the defendants' store employees, the court preliminarily enjoined the defendants' use of these tape duplication machines and its provision of copyrighted recordings to customers, because the "defendant has permitted unauthorized reproductions of plaintiffs' copyrighted tapes in its stores." *Id.* at 823 (internal quotations and citation omitted). Commentators have viewed the court's finding in that case, made in the absence of resolution as to the employees' role, as one of contributory liability. *E.g.,* 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT ("NIMMER") § 12.04[A][3][b] (2006); Michael J. McCambridge, *Contributory Infringement by Providing the Means: The Staple Article of Commerce Doctrine and an Aternative Analysis for Copyright Law*, 18 J. MARSHALL L. REV. 703, 713 (1985); M. David Dobbins, *Computer Bulletin Board Operator Liability for Users' Infringing Acts*, 94 MICH. L. REV. 217, 234 (1995). Insofar as *Elektra* turned on the defendants' indirect liability for customer's copying, it is inapposite to the case at bar -- and actually supports Cablevision's position that it could not be held liable in this case -- because plaintiffs have explicitly waived any indirect infringement claims.

[5] The Turner Plaintiffs at one point in their brief claim that this is to ask the wrong question, because more than one party can be responsible for the same infringement. *See* Turner Mem. at 14-15. Plaintiffs cite to no case indicating that the subscriber and Cablevision could both be *direct* infringers. The one case cited in support of this joint liability proposition, *New York Times Co. v. Tasini,* 533 U.S. 483, 498, 506 (2001), simply establishes only that a party can be responsible for *authorizing or assisting* another's infringing conduct. *See Tasini*, 533 U.S. at 498, 506 (holding that Electronic Publishers infringed the authors' copyrights by unlawfully reproducing and distributing the articles, and that the Print Publishers infringed the authors' copyrights by *authorizing and assisting* the Electronic Publishers to do so). These are concepts of indirect liability, predicated on another party's underlying liability, *see* Cablevision Mem. at 12, n.2, and plaintiffs have explicitly waived the argument that Cablevision will be indirectly liable for illegal copying by RS-DVR subscribers.

copy what the consumer wishes, the cases consistently recognize that the customer "does" the copying. Far from being "minimally involve[d]" in the copying, with RS-DVR, the customer drives the copying process, just as he does with a Betamax, a photocopier, or an STS-DVR. While the Turner Plaintiffs concede that the recording and playback *with an STS-DVR and VCR* are under the user's "exclusive control," Turner Mem. at 6,[6] the same is true of RS-DVR.

B. *Cablevision's Oversight of the RS-DVR System Does Not Mean that It is Actively Engaged in Copying.*

Plaintiffs at various points in their briefs assert that Cablevision owns, maintains, programs, sets up, operates, and/or controls the RS-DVR system. *See, e.g.*, Fox Mem. at 1, 4, 15, 17-18, 20; Turner Mem. at 1-2, 7. To the extent that these references are more than rhetorical[7] and meant to suggest that Cablevision is actively engaged in the copying that takes place on the system, the proposition is completely unsupported in the case law. Plaintiffs do not cite to a *single case* in which a company's designing or servicing a copy system (whether a complex or a simple one) makes the company liable as a direct infringer for copies made using the system.

Since the seminal *Netcom* case, *Religious Technology Center v. Netcom On-Line Communications System, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), courts have viewed as

[6] Should the Turner Plaintiffs recast their statement to say that the set-top DVR *box itself* is exclusively under the user's control, they would simply be incorrect with respect to cable operator-provided set-top DVRs. Cablevision, like other cable operators, owns and services the set-top boxes it provides to its customers. Hemani Decl., Ex. A, Mitchko Decl. ¶ 6. Customers have no more control over or access to the hard drives located within the set-top box than they will with respect to the hard drives located on Cablevision's RS-DVR servers. For example, Cablevision subscribers are prohibited from opening the set-top boxes and accessing the hard drive (or the other hardware and software) within the boxes. Hemani Decl., Ex. S, Declaration of Alan Azralon in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment ¶ 4.

[7] Some of plaintiffs' characterizations are also inaccurate, or at least fundamentally ambiguous. For example, to say that Cablevision "operates" the RS-DVR system may be accurate if what is meant is that Cablevision will oversee the servers and other equipment at the head-end to make sure that they are functioning properly (much like Kinko's does with the self-service photocopiers on its premises). However, it cannot be said that Cablevision will "operate" the system in the sense of directing the equipment to make copies of particular programming. The subscriber "operates" the recording equipment in that sense of the word. The same can be said of the word "controls."

obvious that designing, maintaining, or operating the automated copying system itself (as opposed to what is recorded on the system) does not make the system operator a direct infringer. *Netcom*, 907 F. Supp. at 1368. In *Netcom*, the court considered whether an internet service provider could be held liable for direct infringement based on the fact that its customers used its servers to copy and transmit copyrighted content. *Id.* The court found that Netcom could not be liable as a direct infringer because, "Netcom did not take any affirmative action that directly resulted in copying plaintiffs' works *other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers onto the Usenet, and temporarily stores copies on its system.*" *Id.* at 1369 (emphasis added). *See also id.* at 1369-70 (noting that party should not be directly liable for copying simply based on "initial[ly] setting up," "operat[ing]" or "implement[ing]" an automated copy system).

Significantly, it was only in connection with the plaintiffs' *indirect* infringement claims that the *Netcom* court considered relevant that Netcom "retains some control over[] the use of its system," *id.* at 1374, and, in particular, examined whether Netcom could have screened messages before they were posted or whether it knew enough about the infringing conduct on its system that it simply should have deleted the offending data, *see id.* at 1370 ("Whether a defendant makes a direct copy that constitutes infringement cannot depend on whether it received a warning to delete the message. This distinction may be relevant to contributory infringement, however, where knowledge is an element.") (citation omitted)). In the context of direct infringement, by contrast, it simply did not matter to the court that Netcom designed, operated, and maintained the computer system.

Similarly, in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), the Fourth Circuit specifically noted that mere ownership, operation, or maintenance of computer system that automatically records material does not constitute direct infringement:

> To conclude that … persons are copyright infringers simply because they are involved in the *ownership, operation, or maintenance* of a transmission facility that automatically records material – copyrighted or not – would miss the thrust of the protections afforded by the Copyright Act.

373 F.3d at 551 (emphasis added).

In short, Cablevision does not become directly liable for copying simply because it maintains and services the RS-DVR equipment that customers can use to make copies.

C. ***Cablevision Does Not Become Directly Responsible for Customer Copy Decisions Because of its Role as a Cable Operator.***

Plaintiffs repeatedly emphasize that Cablevision "supplies" or "selects" the copyrighted programming that is available for recording using the RS-DVR. *See, e.g.*, Fox Mem. at 1 (stating Cablevision "itself selects and offers" the copyrighted programming copied and transmitted as part of RS-DVR); Turner Mem. at 15 (stating Cablevision would "supply the copyrighted works" in the context of RS-DVR). To the extent that plaintiffs mean by this to suggest that Cablevision is actively engaged *in* copying because it plays a role in determining the universe of programming available to customers *for* recording, they are simply wrong.

First of all, even if the premise were factually sound, the notion that Cablevision "provid[es] the subscribers with access to copyrighted works that Cablevision itself selects and offers the subscribers," Fox Mem. at 1, does not distinguish RS-DVR from Cablevision's provision of STS-DVRs. It might equally be said that Cablevision's STS-DVRs copy "copyrighted programming on linear channels that Cablevision selects and makes available to subscribers." Fox Mem. at 16. Plaintiffs do not suggest that because Cablevision, together with programmers, decides which linear channels will be carried on its cable system for cablecasting that this somehow means that Cablevision is "doing" the copying when a subscriber records programming with an STS-DVR owned and provided by Cablevision.

In any event, plaintiffs' premise that Cablevision "selects" and "supplies" copyrighted works is itself formulated to mislead. Cablevision has a measure of choice with respect to which *programmers* will be aired on its cable systems, but that choice is itself constrained by law in certain respects,[8] and even in situations where Cablevision chooses to carry a programmer on its cable systems, it can do so only with the programmer's consent. Hemani Decl., Ex. C, Deposition of Edward McRae Budill, dated July 25 ("Budill Dep.") at 20:19 – 21:19. Moreover, it is the programmers who supply the copyrighted content that is cablecast on each of the channels carried on Cablevision's cable system (otherwise there wouldn't be a justiciable case here), and Cablevision has no role in determining what programming is carried on these various channels. Thus, it is inaccurate to say that Cablevision "supplies" or "selects" the copyrighted works that are made available over its cable system.

Much more importantly, Cablevision will be indiscriminate and entirely content neutral in choosing what linear channels will be available for customer recording *through RS-DVR*. *Cf. Netcom*, 907 F. Supp. at 1372 (noting that contributing actions of the BBS provider were "automatic and indiscriminate"). Despite Turner's misleading claims, *e.g.*, Turner Mem. at 7, the undisputed facts establish that Cablevision has not made and will not make any linear channel-by-linear channel selections, inclusions, or exclusions with respect to the RS-DVR it rolls out. Every linear channel that the subscriber is entitled to view live will be available for him to record using RS-DVR, just as with the STS-DVR. Hemani Decl., Ex. A, Mitchko Decl. ¶¶ 6, 12, 15. Moreover, "mak[ing] available" programming for copying is not relevant to the *direct* infringement claim that plaintiffs have elected to bring, and for indirect liability claims where that factor does have relevance, there is *no case* that holds or even suggests that

[8] For example, under the "must-carry" rules, certain broadcast stations can require Cablevision to carry them. 47 U.S.C. § 534 (2006); 47 C.F.R. §§ 76.55-57 (2006).

indiscriminately passing along a large universe of potential works for subscriber copying turns the conduit into the infringer.

In sum, Cablevision has the most tenuous and indirect connection to the ultimate decision as to what gets copied. The subscribers, not Cablevision, decide what to record, and that is what matters.

II. THE UNDISPUTED FACTS AND CONTROLLING LEGAL PRINCIPLES FORECLOSE PLAINTIFFS' CLAIM OF DIRECT "PUBLIC PERFORMANCE" LIABILITY.

Plaintiffs also maintain that when a customer plays back from storage the copy of a television program he recorded, Cablevision is engaged in an unauthorized "public performance." This argument defies the plain meaning of the Copyright Act, the central teaching of the pertinent case law, and common sense.

Section 106(4) of the Copyright Act reserves to the copyright owner the exclusive right to perform a work "publicly," which it extends to transmitting a performance "to the public." 17 U.S.C. §§ 101, 106(4) (2006). In other words, copyright owners have no copyright rights that allow them to control private performances. RS-DVR playback consists of a separately delivered video stream retrieved from a subscriber's unique, personally recorded copy and viewable only though that subscriber's set-top box. Given these undisputed facts, there are two clear and independent reasons why Cablevision cannot be found to be engaged in unauthorized public performances using RS-DVR. First, because Cablevision is merely providing the customer the technological means to stream his own, private copy to himself, Cablevision cannot be said to be "doing" the performing involved in RS-DVR. Second, even if Cablevision is "doing" the performing, RS-DVR is a quintessentially *private* performance: each stream emanates from a unique, personally-recorded private copy that is only available to the subscriber who recorded it.

Amazingly, plaintiffs' "public performance" arguments do not even acknowledge the critical fact that RS-DVR involves playback of the subscriber's own, private copy, nor do they attempt to explain how their "public performance" claim could possibly overcome this fact.

A. *Plaintiffs Misapply the Law as to What it Means to be Engaged in A Performance.*

To establish their prima facie public performance case, the plaintiffs must show that Cablevision is "doing" the transmitting. The basic analytic framework that applies to the question of "who is doing the transmitting" is identical to that which applies in the reproduction context. While to be sure Cablevision's *equipment* is used to "transmit" recorded copies of programs from one place to another, just as Cablevision's *equipment* makes the recordings, this does not mean that *Cablevision* is "doing" the transmitting, any more than Kinko's is "doing" the copying that occurs on its self-service machines. Thus, no less than in the copy context, showing that Cablevision does the transmission involved in RS-DVR would require proof that Cablevision does something more than merely provide its customers a machine or system that indiscriminately transmits whatever programs the customer has elected to record and play back -- a showing that is foreclosed by the undisputed facts in this case.

A line of cases dating back over a decade establish the proposition that the provider of a system, like RS-DVR, that automatically copies, stores, and transmits data at the instigation of a user is not a direct infringer. *See, e.g.*, *Netcom*, 907 F. Supp. at 1365-68, 71-72; *Marobie-Fl.*, 983 F. Supp. at 1178; *CoStar*, 373 F.3d at 555. In each of these cases, the court was asked to decide the legal significance of a company's providing machinery and technology that allowed customers to store and transmit copyrighted material across a computer network; each case specifically analyzed the distinction between direct liability and indirect liability; and each rejected claims of direct infringement, on the ground that providing the means for users to send materials across a computer-based system cannot be a basis for imposing such liability. *Id.* The courts in each of these cases recognized that when the defendant is a "passive conduit" for copyrighted material, *CoStar*, 373 F.3d at 548, in that the system operated by the defendant "automatically transmits users' material, but is itself totally indifferent to the material's content," *id.* at 551, direct liability is unavailable as a matter of law.[9]

In their "public performance" argument, plaintiffs fail even to mention *Netcom* and its progeny -- a conspicuous failure given that these cases appear to be the *only* precedents that specifically address the distinct requirements of direct and indirect liability in a factually analogous situation. Instead, plaintiffs suggest that Cablevision is directly liable for enabling customers to retrieve their own earlier recorded copies of programs under *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991). *See* Fox Mem. at 11-13, Turner Mem. at 18-19. That is untenable. As discussed in Section II.B, below, the VOD-like system involved in *On Command* (in which the provider introduces content into the system) is easily distinguishable from RS-DVR (where the subscriber records the content that is transmitted through the system). That is to say, with RS-DVR -- like the systems at issue in *Netcom* and its progeny, and unlike a VOD system -- *the entire system*, of which playback is the ultimate result, responds automatically to user commands -- to copy, store, *and* transmit. Cablevision determines neither which recorded content will *be available* to be retrieved nor which specific content *will actually be* retrieved by customers; the customer controls *both* the recording and playback processes. As such, Cablevision, like an ISP, cannot be liable as a direct infringer for any of the conduct that takes place on its system. *See CoStar*, 373 F.3d at 550 ("[A]n ISP who owns an electronic facility that responds automatically to users' input is not a direct infringer."); *id.* at 555 ("Agreeing with the analysis in *Netcom*, we hold that the automatic copying, storage and transmission of copyrighted materials, when instigated by others, does not render an ISP strictly liable for copyright infringement.").

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[9] This is not to say that the defendant did not determine the *general category* of content that could be delivered through its system, but rather that the defendant did not decide which *specific content* would be copied into its servers and delivered to other users. For example, in *CoStar*, defendant LoopNet limited the category of content made available on its website to commercial real estate listings and photographs, and even its employees served as gatekeepers to ensure that only photographs falling into that category were downloaded onto its computer servers. *CoStar*, 373 F.3d at 547. Despite this measure of control over the content posted on and transmitted through its servers, the *CoStar* court found LoopNet to be sufficiently passive to avoid direct liability because it "does not attempt to search out or select photographs for duplication." *Id.* at 556.

B. *Transmissions Resulting From Customer Use of the RS-DVR Are Fundamentally Private.*

Even if Cablevision were deemed to be transmitting performances of copyrighted works, plaintiffs could not possibly show that RS-DVR amounts to a *public* performance. Section 101 of the Copyright Act defines what it means, "to perform a work 'publicly'" as "to transmit or otherwise communicate a performance… of the work… to the public, by means of any device or process whether the members of the public capable of receiving the performance…receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. The indisputable fact is that the only transmission involved in RS-DVR involves a unique, private recording created by a single customer -- one that is capable of being perceived by that one customer alone. *See* Hemani Decl., Ex. A, Mitchko Decl. ¶¶ 14, 24, 36, 41; Hemani Decl. Ex. B, Mitchko Dep. at 47:13-48:3; 61:8-23; 63:12-24. No other customer has access to that copy, and that copy cannot be received for playback by any other set-top box. *Id.* Given this, there is simply no good argument that the customer's retrieval and viewing of his or her own recorded programming involves a transmission that is public in nature.

1. The Fact That Cablevision Has A Commercial Relationship With Customers Does Not Make RS-DVR Transmissions Public.

The Turner Plaintiffs attempt to counter the above facts by suggesting that the dispositive factor in determining whether a transmission is "to the public" is not the number of people who are capable of receiving it, but rather whether the relationship between the customer and the owner of the system facilitating the transmission is a "commercial one." They are wrong. A transmission of a unique recording to the *one customer* who made it, by means that do not permit any other party to view it, is not "to the public" regardless of the commercial nature of the relationship of the parties involved.

Under the statute, a work is performed "publicly" either if the performance occurs in a place "open to the public" or a semi-public place (the "public place" clause), or if there is a transmission that "*members* of the public" are "capable of receiving" (the "transmit" clause). 17 U.S.C. § 101 (emphasis added). Thus, for plaintiffs to succeed, they must demonstrate that one of these two conditions is met. Most of the cases plaintiffs identify as relying on the "commercial relationship" between defendant and viewer to establish a public performance do not even involve the transmit clause at all, but rather address the entirely distinct issue of whether a particular performance occurred in a location that was, for purposes of the "public place" clause, "public."

For example, in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984), *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986), and *Video Views, Inc v. Studio 21, Ltd.*, 925 F.2d 1010 (7th Cir. 1991), the question presented was whether exhibitions of motion pictures in a small individual booth located on the premises of a video store or arcade constituted a public performance. The courts in those cases held that because the places where the performances occurred were commercial *establishments* that were "open to the public," the fact that the booths themselves were "private" would not defeat liability on a public place theory. *See Redd Horne*, 749 F.2d at 159 (performance occurring in a private viewing room within a store occurred "at a place open to the public" because the entire store, including the viewing rooms, was open to the public); *Aveco*, 800 F.2d at 62-63 (following *Redd Horne*); *Video Views*, 925 F.2d at 1019-20 (agreeing with *Redd Horne* and *Aveco* that in determining whether a performance occurs in "a place open to the public," the character of the place in which the private booths are located is controlling).

With RS-DVR, by contrast, the performances take place in the subscriber's home. It is unquestionable that a home, unlike a viewing booth in a public establishment, is a private place not "open to the public." Therefore, to the extent that the cases cited by plaintiffs rely on the "commercial" character of the *place* where viewing occurs, they are neither relevant nor helpful to the plaintiffs' argument.

To the extent that the cases cited by plaintiffs address the commercial relationship between the provider of the films and the viewer in the context of the transmit clause, they do so in a way that offers no support at all to the plaintiffs' theory. *See On Command*, 777 F. Supp. at 790 (N.D. Cal. 1991); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002), *aff'd* 342 F.3d 191 (3d Cir. 2003), and portions of *Redd Horne*, 749 F.2d 154. Each of the cases plaintiffs cite involved businesses -- a hotel (*On Command*), a video store (*Redd Horne*), and an internet-based film clip provider (*Video Pipeline*) -- that provided content to the public generally, even though the content could be accessed by individuals in a private place. The courts in these cases referenced the commercial relationship between the provider and the viewer only to demonstrate that the individuals accessing the content were "members of the public" and to reach the unexceptional conclusion that they did not cease to be so simply because they were in a private location, *i.e.*, that the transmission and public place clauses are alternative bases for imposing liability. None of these cases suggest that a transmission is "to the public" when it is capable of being received by a *single* customer whose relationship with the defendant is "commercial."

Cablevision does not deny that its subscribers are "members of the public" or that the RS-DVR technology would be available, on a commercial basis, to any Cablevision digital customer. Rather it asserts that the content at issue is not "capable of being received" by more than one of these "members of the public." Hemani Decl., Ex. A, Mitchko Decl. ¶¶ 14, 24, 36, 41; Hemani Decl Ex. B, Mitchko Dep. at 47:13 – 48:3; 61 8-23; 63: 12-24. The critical fact with RS-DVR -- and the key difference between RS-DVR and the video transmission systems involved in the cases on which the Turner Plaintiffs rely -- is that there will be no common recording made generally available for viewing by all members of the public (as in *Video Pipeline*) or a segment of the public (*i.e.*, any and all hotel guest or any video store customer, as in *On Command* and *Redd Horne*). Rather, each transmission involved in the RS-DVR would be of a private copy created by and uniquely associated with a single set-top box and "capable of [being] receiv[ed]" only by one household through that set-top box.[10] 17 U.S.C. § 101.

In sum, "public performance" liability is impossible here because "if a transmission is available to only one person, then it clearly fails to qualify as 'public.' For it neither directly reaches a 'substantial number of persons' nor is it transmitted to a place where such a grouping is congregated." 2 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT ("NIMMER") § 8.14[C][2] (2006) (quoting 17 U.S.C. § 101 (definition of "publicly")).

[10] The Turner Plaintiffs suggest that it somehow matters to the public performance analysis that "transmissions go to all subscribers on the node, even if only one 'receiving apparatus' (a set-top box) is able to display the program on a television set." Turner Mem. at 18 This suggestion is easily dismissed. Under the transmit clause, a transmission is "to the public" only if multiple members of the public are "capable of receiving the performance or display." 17 U.S.C. § 101. *See also id.* (defining to "transmit" a performance as "to communicate it by any device or process *whereby images or sounds are received* beyond the place from which they are sent") (emphasis added). The undisputed facts establish, and plaintiffs specifically acknowledge, that only one set-top box (and thus one household) is "capable of receiving the performance" involved in each separate transmission. Hemani Decl., Ex. D, Statement of Material Facts Pursuant to Local Rules 56.1 in Support of Turner's Motion for Summary Judgment ("Turner L.R.56.1") ¶ 50.

2. In Respects Relevant to the Copyright Act, RS-DVR Is Different From VOD.

Without a coherent argument that the use of RS-DVR results in "public" performances, both sets of plaintiffs attempt to gain traction by describing RS-DVR as a VOD system. *See, e.g.*, Turner Mem. at 2 ("[Cablevision's] RS-DVR service is essentially nothing more than a VOD system . . . "); Fox Mem. at 1 (characterizing RS-DVR as an "unauthorized on-demand programming service"). Their goal, clearly, is to make cases which have dealt with VOD-type technology appear relevant to this case. Because RS-DVR and VOD are factually and legally distinct, this strategy cannot succeed.

VOD involves (i) the cable operator (together with the programmer) selecting specific recorded content to make available for playback to VOD subscribers, which content may never air on a linear channel; (ii) the cable operator loading one or more copies of each program into its servers, not in any manner in response to any subscriber commands; (iii) the same common copy of a program being made generally available for transmission to multiple VOD subscribers; and (iv) the VOD subscriber being able to watch "on demand" any such programming without having to record the program and without having the ability to delete the centrally-stored copy. RS-DVR shares *none* of these defining features of VOD. Rather, RS-DVR involves (i) *the RS-DVR subscriber* deciding which linear content he wishes to record to make available for playback at a later time; (ii) *the RS-DVR subscriber* taking the manual steps necessary to effectuate recording; (iii) *the RS-DVR subscriber's own private copy* being streamed to his box in a manner that can be received only by his box; and (iv) the RS-DVR subscriber being able to play back and view only those programs that he elected to record and then being able to delete his copy, thereby losing the ability to view it. (It is worth noting that these four attributes -- while completely different from VOD -- are identical to set-top DVR.)

Once these essential differences between VOD and RS-DVR are acknowledged, it is clear that the VOD-type cases relied on by plaintiffs to support their claim of "public" performance simply do not fit the facts presented in this case. For example, both plaintiffs rely heavily on the *On Command* case to support the assertion that RS-DVR involves a "public" performance. In that case, the defendant had developed a system for the electronic transmission of movies from a centrally-located bank of video cassette players located within a hotel to individual hotel rooms. *On Command*, 777 F. Supp. at 788. One VCR tape from among preselected sets of films was loaded into each video cassette player, and that tape was then showed over and over to different hotel guests. *Id.* As such, *On Command* did not involve the transmission of separate individual recordings solely to the individuals who made such recordings. To the contrary, repeated transmissions from an operator-procured common copy were made to different hotel guests. In this way, the system operated exactly like a VOD system. While each operator-procured common copy could be transmitted only to one hotel room at a time, each such copy was capable of being transmitted numerous times to different customers in different rooms. Thus, by definition, "members of the public" were "capable of receiving" transmissions of the operator-procured common copy "in separate places" and "at different times." 17 U.S.C. § 101.

Unlike the facts in *On Command*, each and every RS-DVR transmission is from a subscriber-made, private copy, and no other subscriber is "capable of receiving" it, whether "in separate places" or "at different times." 17 U.S.C. § 101.[11]

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[11] It is worth noting that each subscriber-made copy is distinct in that it is physically different -- and may be substantively different -- than other copies of the same program that other subscribers may make on the RS-DVR system. For example, the copies may differ in length depending on when a customer starts or stops recording an in-progress program. Further, every subscriber's disk copy will be subject to whatever artifacts or corruption may exist on it. Hemani Decl., Ex. E, Expert Report of Paul Horowitz on the Operation and Technology of Cablevision's "Remote Storage Digital Video Recorder (RS-DVR) ("Horowitz Report") at 24, n.55. And, of course, if a

The importance of the distinction can be seen by considering how the *On Command* case would have been addressed differently under slightly altered facts. For example, if a hotel merely allowed customers to bring their own videotapes to play on a central bank of VCRs within the hotel (connected to each room by a cable), and the transmission of each videotape brought in by each customer was limited to the room in which that customer was staying, the hotel would obviously not be engaged in a "public" performance. In that instance, each videotaped copy would only be transmitted to the individual customer who supplied the videotape. As a result, it would not be available to "the public" even at separate places or at different times. Moreover, the fact that other hotel guests might bring in their own videotapes of the same film would hardly transform each customer's quintessentially private transmission of his or her own copy into a public performance by the hotel.

Commentators have supported this conclusion, noting that, for the purposes of analyzing whether a performance is "public," what matters is whether the same copy of a work will be repeatedly played for different members of the public at different times. Professor Nimmer, in his well-known treatise, makes this point explicitly when addressing what Congress intended by the phrase "whether the members of the public capable of receiving a performance receive it in the same place or in separate places and at the same time or at different times." He reasons that,

> [I]t would seem that what must have been intended was that *if the same copy* (or phonorecord) of a given work is repeatedly played (*i.e.*, "performed") by different members of the public, albeit at different times, this constitutes a "public" performance.

2 NIMMER § 8.14[C][3] (emphasis in original).

The distinction identified by Nimmer was endorsed by the Third Circuit in *Redd Horne*, a

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subscriber deletes his copy of the program (or if it gets sufficiently corrupted) he will not be able to play the program back at all. Hemani Decl., Ex. B, Mitchko Dep. at 352: 2 –15.

case relied on by the plaintiffs. In that case, the Third Circuit considered whether a video store was engaging in public performances when it acquired a collection of individual video cassettes of movies and, for a fee for each showing, transmitted the recorded content from a VCR in the front of the store to customers sitting in private booths elsewhere within the store. *Redd Horne*, 749 F.3d at 156-57. After examining what Congress meant by a transmission "to the public," the court -- in a portion of the opinion noted by neither set of plaintiffs -- indicated that,

> Professor Nimmer's examination of this definition is particularly pertinent: "*if the same copy*... of a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance." 2. M. Nimmer, § 8.14 [C][3], at 8-142 (emphasis in original).... Although [defendant] has only one copy of each film, it shows each copy repeatedly to different members of the public. This constitutes a public performance.

Id. at 159.

According to the Third Circuit (following Nimmer), the critical damning fact in *Redd Horne* was that the defendant had procured (and presumably paid for) a copy of a film, but then was deriving further value from that copy by showing it repeatedly for a fee to different members of the public in unauthorized public performances. RS-DVR does not fit this basic paradigm. With RS-DVR, subscribers record programming they are entitled to watch -- which recordings they are entitled to make under the well-settled precedent of *Sony* -- and the subsequent transmission is merely a mechanism to allow the subscriber to view this recorded content. That is to say, unlike the VOD-type system in *Redd Horne*, and like STS-DVR, the RS-DVR system does not make generally available to customers a common copy procured by Cablevision in exchange for a per-showing fee.

For similar reasons, the other cases cited by the plaintiffs to support their public performance argument are completely inapposite. For example, in *Infinity Broadcasting Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), the Second Circuit analyzed whether the defendant could establish a fair use defense with respect to its retransmission of radio broadcast signals by telephone to paying customers in areas outside of the radio stations' broadcast coverage. *Kirkwood*, 150 F.3d at 106. The service provided in that case is easily distinguishable from RS-DVR. Radio broadcasts are clearly "public" performances because they are generally available to the public, and the defendant's service of retransmitting far-away radio broadcasts to any paying customer was also clearly a "public performance" for much the same reasons as the broadcasts themselves. In fact, the defendant conceded that there was a public performance in *Kirkwood*, which is why the case centered on its fair use defense. *See Infinity Broadcasting Corp. v. Kirkwood*, 965 F. Supp. 553, 555 (S.D.N.Y. 1997). Unlike with RS-DVR, in *Kirkwood* it could not be said that the defendant merely provided a machine or technology that allowed customers to transmit to themselves content to which they had access at the time of the original broadcast and which they themselves elected to make available for later viewing/listening. Rather, the defendant's technology transmitted content that customers could *not* otherwise have access to -- *i.e.*, radio broadcasts outside of the stations' broadcast area -- and indeed that was the technology's entire point.

Distinguishable for similar reasons are *National Football League v. Primetime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000) (involving uplinking copyrighted material to a satellite, after which it was downlinked from the satellite to the home subscriber) and *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752 (S.D.N.Y. 1988) (satellite transmission to the cable head-end, after which the cable operator retransmitted it to the home subscriber). Both are cited prominently by the Fox Plaintiffs. *See* Fox Mem. at 13-14. In those cases, the court held that an intermediate step in the process by which copyrighted material is transmitted to a public audience counts as a "public" performance, even though the particular intermediate transmission in which the defendant was involved did not itself directly reach the public audience. *See Showtime/The Movie Channel*, 697 F. Supp. at 758-59. With RS-DVR, of course, the transmissions are inherently private and *never at any step in the process* reach a public audience.

In sum, RS-DVR is a private performance because it is the result of a subscriber's private copy and a subsequent private transmission from that private copy. The stream is available only to the person who made the copy (and other members of his household). With VOD, by contrast, an operator-procured common copy is repeatedly shown to different members of the public, much like cable or satellite transmissions or the radio retransmissions in *Kirkwood* are made available to a general audience.[12]

3. The Fox Plaintiffs' Reliance On Sections 111 and 114 Of The Copyright Act Is Misplaced Because This Case Involves Neither A Compulsory License Nor Sound Recordings.

Perhaps the clearest indication that plaintiffs are straining to show that RS-DVR transmissions are public comes in the Fox Plaintiffs' retreat to lengthy discussions of sections of the Act not at issue in this case (17 U.S.C. §§ 111 and 114). These sections deal with compulsory licenses and limitations on the exclusive rights in musical performances respectively

[12] Plaintiffs may (or may not be) attempting a different argument -- that RS-DVR transmissions somehow become "public" in nature because Cablevision has also engaged in routine cablecasting of the same programs. *See* Turner Mem. at 18; Fox Mem. at 7, 9. If plaintiffs are indeed making this argument, it clearly fails. Cablevision's retransmission of programming to its subscribers as part of routine cablecasting is licensed by the programmers carried on Cablevision's cable system, including these plaintiffs. *See* Hemani Decl., Ex. C, Budill Dep. at 20:19 – 21:19; Hemani Decl., Ex. D, Turner L.R.56.1. ¶ 9. Therefore, it in no way supports plaintiffs' claim that Cablevision will be engaged in *unauthorized* public performances using RS-DVR that it is also engaged in *authorized* public performances when it transmits programming in real time as part of routine cablecasting. Plaintiffs do not cite to *a single case* that would support a conclusion that such licensed, real-time transmissions as part of regular cablecasting can be lumped together, and labeled as the same "performance" with a subsequent playback of a subscriber's copy that he made and stored in RS-DVR. Plaintiffs refer only to the statutory language that a public performance can consist of transmissions "at different times;" however, by plaintiffs' own account, when Congress spoke of transmissions "at different times" it referred to the same in the context of "sounds or images stored in an information system." *See* Fox Mem. at 9-10 (citing to H.R. Rep. No. 90-83, at 29 (1967)). Such obviously does not apply to real-time transmissions as part of cablecasting, which are not stored in any "information system." Therefore, plaintiffs' one hook for its argument does not support it. In sum, the fact that Cablevision retransmits linear programming to its subscribers in its role as cable operator has no bearing on the public performance question.

-- issues that have no relevance to this case. The attempt to use these unrelated provisions in the Copyright Act to prop up a failing effort cannot succeed.

Section 111 of the Copyright Act lays out certain limitations on the copyright owner's exclusive rights by instituting a compulsory license scheme for simultaneous transmissions of broadcasts by a cable system. *See* 17 U.S.C. § 111. Cablevision makes no claim here that its customers' use of the RS-DVR is covered under this compulsory license scheme. As a result, this provision is wholly irrelevant to the issues in this case.[13]

Similarly, section 114 of the Copyright Act deals with subject matter entirely unrelated to the facts of this case. That section merely limits exclusive rights in sound recordings. *See* 17 U.S.C. § 114. The Fox Plaintiffs suggest that because that section does not exempt what amounts to "audio on demand" transmissions -- where the transmitter offers to transmit sound recordings on demand -- it must mean that Cablevision is engaging in a "public performance" when its customers retrieve their own recorded programming. Of course, the logic again fails. Cablevision is not providing audio on demand with the RS-DVR. Nor is it, for that matter, providing video on demand, as discussed previously. Rather, it is providing a machine that allows its customers to retrieve the programming they themselves have recorded.

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[13] To the extent that the Fox Plaintiffs' are suggesting § 111 conveys to plaintiffs some copyright right (such as a "no-non simultaneous secondary transmission right") beyond those set forth in Section 106, they are mistaken.

The general scheme of the Copyright Act is that § 106 (as its title "Exclusive rights in copyrighted works" suggests) sets forth the exclusive rights of the copyright owner. Those rights are "[s]ubject to sections 107 through 122," which are limitations on, qualifications to, or exemptions from those exclusive rights. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1975), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 ("The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106 [this section], and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 [this section] is made 'subject to sections 107 through 118 [sections 107 through 118 of this title],' and must be read in conjunction with those provisions."). Section 111 itself is entitled "Limitations on exclusive rights: Secondary Transmissions." As such, § 111 merely *limits* or qualifies the liability that would otherwise accrue by reason of § 106 and cannot plausibly be said to create some kind of additional liability regarding secondary transmissions. *See* 2 NIMMER §8.18[B]. Thus, § 111 notwithstanding, a transmission involving RS-DVR could not be infringing unless it was "to the public" within the meaning of § 106(4), and as we have demonstrated in our memorandum in support of summary judgment, and as discussed further herein, RS-DVR does not involve public performances. Put differently, to the extent that RS-DVR transmissions do not fit within § 111, it means at most that those transmissions are not subject to statutory licensing under the copyright law, and Cablevision does not maintain that they are.

III. OTHER ARGUMENTS ASSERTED BY TURNER PLAINTIFFS BUT NOT BY THE MAJORITY OF PLAINTIFFS IN THIS CASE.

Apparently not satisfied with the "open-and-shut" case they originally presented to this Court (Turner Mem. at 1), the Turner Plaintiffs include in their summary judgment submission various claims not presented in their Complaint and not advanced by the other plaintiffs. These back-up arguments also fail.

A. *Plaintiffs Fail To Establish A Copyright Claim Based On The Transitory Buffering Of Minute Bits Of Programming Data Associated With The RS-DVR.*

The Turner Plaintiffs contend that Cablevision creates infringing "copies" when small bits of programming data are placed into computer memory "buffers" [14] during the technological process by which aggregated programming is streamed into the RS-DVR, and recorded and retrieved by customers.[15] This argument (relegated by the Fox Plaintiffs to a footnote) is meritless. Initially, as the Turner Plaintiffs acknowledge, various of the "buffers" involved in RS-DVR arise specifically at the initiation of the RS-DVR customer as part of his or her copying and playback of the programming in question. The Turner Plaintiffs apparently are not challenging these subscriber-initiated buffers, nor could they; such buffering is no more actionable than the copy ultimately stored by the customer on the RS-DVR. In short, this buffering, while taking place on Cablevision machinery, is directly caused by the customer, and

[14] "Buffering" is the process by which digital data are placed into temporary memory so that a computer system can direct or process that data. Buffering is "universal" in digital devices, including, most notably, set-top DVRs. *See* Expert Report of Paul Horowitz on the Operation and Technology of Cablevision's "Remote Storage Digital Video Recorder" (RS-DVR) ("Horowitz Report") ¶¶ 50, 51; Declaration of Kirk Blattman in Opposition to Plaintiffs' Motion for Summary Judgment ("Blattman Decl.") ¶ 7.

[15]

REDACTED

thus Cablevision cannot be directly liable for it.

REDACTED

additional reasons: (1) these buffers are "transitory" in every respect and not fixed "copies" actionable under the Copyright Act; and (2) any putative copying within these buffers is *de minimis*, and not cognizable as a copyright violation.

To begin, the content of the buffers in question is not "fixed." The Copyright Act defines "copies" as:

> Material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 101. A work is "fixed" when its embodiment in a copy, "is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated *for a period of more than transitory duration.*" *Id.* (emphasis added).

These definitions were adopted for the first time in the 1976 Act, and the legislative history accompanying the Act makes clear that Congress's intention was that:

> [T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or *captured momentarily in the "memory" of a computer.*

H.R. Rep. No 94-1476, 94th Cong., 2d Sess. 53 (1975) ("1975 House Report"), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666 (emphasis added).

The buffering alleged by plaintiffs as creating infringing copies does not "fix" data. The data are buffered only momentarily -- and only for the purposes of transfer and grooming as the data passes through the system. **REDACTED**

REDACTED

REDACTED

[16] **REDACTED.** That buffers squarely meet Congress' notion of "transitory" computer memory, and are thus not "fixed" as that term is defined in 17 U.S.C. 101. Furthermore, plaintiffs have offered no facts to support the notion that any buffering that occurs in the clamper is anything other than similar, ephemeral, transitory data processing, as is carried out in connection with most computer processing.

The cases cited by plaintiffs do not suggest otherwise. In *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), the Ninth Circuit held that "copies" of software loaded into a computer's RAM were "fixed." *MAI*, 991 F.2d at 518-519. In that case, a copy of the *entire* operating system sat in RAM for an *indefinite* period of time (long enough for the user to be able to perceive portions of the software), and was *not* in transit anywhere (but rather sitting in RAM at its final destination). *Id.* The RS-DVR buffers share none of these characteristics: they are, among other things, tiny in size, momentary in duration, and in transit and not perceivable by the user. As a result, *MAI* does not suggest that data in the buffers are "fixed."

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REDACTED

The extended duration of the RAM copy involved in *MAI* was made clear in another case involving MAI's software and virtually identical facts, *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356 (E.D.Va. 1994). The court's conclusion that the computer software was "fixed" in memory rested significantly on the fact that the program could stay in memory for an extended period of time, not just seconds. The court observed:

> [I]*f a computer is turned off within seconds or fractions of a second of the loading, the resulting RAM representation of the program arguably would be too ephemeral to be considered 'fixed' or a 'copy' under the Act.* .... MAI's copyright infringement claim is not aimed at situations where the power to the computer is turned off and the RAM erased within a second of the completion of loading. Instead, *MAI's attack focuses on those situations where the computer is left on for a time measured in minutes, if not longer.*

845 F. Supp. at 363 (emphases added). The plaintiffs cannot establish -- and do not allege -- that any of the data that passes through the RS-DVR's buffers will reside there for "minutes, if not longer."

Moreover, the data buffered in the RS-DVR are not fixed because they are *literally transitory* -- that is to say that they are "in transit." The Fourth Circuit in *CoStar Group, Inc. v. LoopNet*, 373 F.3d 544 (4th Cir. 2004), distinguished the buffering that takes place during the transmission process from the more substantial buffering involved when a user downloads software onto his or her computer by articulating a two-faceted test for when the Act's "fixation" requirement is met:

> 'Transitory duration' is thus both a qualitative and quantitative characterization. It is quantitative insofar as it describes the period during which the function occurs, and it is qualitative in the sense that it describes the status of transition.

Id. at 551. The Fourth Circuit found that data placed into buffers in that case was transitory in *both senses* of the word. *Id.* at 550-51. In this case, too, the buffering in question not only involves small portions of programs for short durations, but also only occurs when the data is in transit to another computer component, and ultimately, to the hard drive. As a result, it cannot constitute a "copy."

In addition, any putative copying that is going on in these buffers would be, by its very nature, *de minimis*. In order for infringement to lie, courts in general -- and the Second Circuit in particular -- require that any copying must be material in nature. *Warner Bros. v. ABC*, 720 F.2d 231, 242 (2d Cir. 1983) ("a *de minimis* rule has been applied, allowing the literal copying of a small and usually insignificant portion of the plaintiffs work"); *Knickerbocker Toy Co. v. Azrak-Hamway Int'l, Inc.,* 668 F.2d 699, 703 (2d Cir. 1982); *Marks v. Leo Feist, Inc.*, 290 F. 959, 960 (2d Cir. 1923). As the term "materiality" implies, uses that are *de minimis* are not considered material. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998); *Ringgold v. Black Entertainment Group, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997).

The *de minimis* doctrine recognizes that extending copyright owners' rights to all uses of their works, no matter how minor or fleeting, is not in the public interest. As the Second Circuit noted in *Davis v. Gap, Inc.,* 246 F.3d 152 (2d Cir. 2001), the term *de minimis* can be used to describe a copying that is excused because it is not deemed to be a material impairment of plaintiff's rights, even though it implicates one of the Section 106 rights. *Davis*, 246 F.3d at 172-73. Here, the buffers that exist in connection with the RS-DVR's processing are consequential only in relation to the ultimate copies that get played back to the subscriber. If, as has been demonstrated above, the copies that customers play back are non-infringing, then there is no reason that the putative intermediate copying should be seen as material. For this reason as well, the buffering involved in RS-DVR cannot support a copyright claim.

B. *RS-DVR Does not Involve "Distribution" Under The Copyright Act.*

In their Summary Judgment brief, the Turner Plaintiffs assert a new claim of infringement involving the "distribution" right: a claim not made by the Fox Plaintiffs or even in the Turner Plaintiffs' *own Complaint in this case.*

Turner's freshly-minted distribution claim is obviously without merit and reflects the Plaintiffs' basic misunderstanding of the fundamental categories of rights protected under the Copyright law. Section 106(3) of the Act provides to the copyright owner the exclusive right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3). Under the act, distribution is essentially synonymous with "publication." *Agee v. Paramount Communications, Inc.* 59 F.3d 317, 325 (2d Cir. 1995) (citing to *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 299 (3d Cir. 1991)). The 1976 Act defines "publication" as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101. *See also* 2 NIMMER § 8.11[A] (distribution right is the right "publicly to sell, give away, rent or lend any material embodiment of copyrighted work"). "Infringement of this right requires an actual dissemination of either copies or phonorecords." 2 NIMMER § 8.11[A]. Put differently, a material object must actually change hands. *See* 1975 House Report at 138; 1976 U.S.C.C.A.N. at 5754 ("[A]ny form or dissemination in which a material object does not change hands -- performances or displays on television, for example -- is not a publication no matter how many people are exposed to the work.").

The Turner Plaintiffs argue that if the copies located in the subscriber's storage on the Cablevision servers belong to the subscribers, then Cablevision's "physical distribution of these copies to subscribers constitutes infringement as a matter of law." Turner Mem. at 19-20.

However, it is undisputable that Cablevision never "physically distributes" copies to the subscribers. The subscriber initiates recording and creates his own copy. This is simply a reproduction, and there is no distribution of copies *from* Cablevision *to* the subscriber. Nor is there a physical distribution of copies from Cablevision to the subscriber when the customer initiates playback. Indeed, no copy is created in the subscriber's home as a result of the streaming process, therefore it cannot even be said that there is a dissemination of a material object from the head-end to the home.[17]

In sum, Cablevision clearly does not violate plaintiffs' exclusive distribution right.

C. *Prior Versions of Product Offering and Other Things Cablevision Could Do with RS-DVR Are Irrelevant.*

Unable to establish any basis for imposing direct liability under the Copyright Act against Cablevision for its actual RS-DVR product, the Turner Plaintiffs persistently seek to focus the Court's attention on what Cablevision *could have done* -- or could theoretically do in the future -- with alternative versions of RS-DVR. For example, thwarted in their efforts to portray RS-DVR as "essentially nothing more than a VOD system," plaintiffs undertake to persuade the court that the product *could have been* like VOD, before Cablevision "artificially limited" its functionality, Turner Mem. at 10, presenting evidence obtained through discovery about RS-DVR's development as if it were the proverbial smoking gun. However, this court, of course, must render judgment on the lawfulness of the RS-DVR Cablevision intends to launch. Versions that were considered during the development or which could be developed in the future are simply irrelevant to this case.

To demonstrate the potential unlawfulness of possible future versions of Cablevision's RS-DVR, the Turner Plaintiffs introduce evidence that the product was modified during its

[17] Even if RS-DVR somehow could be said to involve "distribution" within the meaning of the Act, the subscriber would be the one doing the distributing, not Cablevision, because the RS-DVR's recording, storage, and transmission processes are all subscriber-initiated. *E.g. Marobie-Fl., Inc.*, 983 F. Supp. at 1178 ("[T]he court nevertheless finds that Northwest only provided the means to copy, *distribute* or display plaintiff's works, much like the owner of a public copying machine used by a third party to copy protected material. Like a copying machine owner, Northwest did not actually engage in *any* of these activities itself. Accordingly, Northwest may not be held liable for direct infringement.") (emphases added).

development to limit its functionality to avoid copyright liability. In fact, the plaintiffs suggest that RS-DVR was artificially limited to "mimic" the functionality of set-top DVR, as if such a decision, made in consultation with attorneys, is inculpatory. Turner Mem. at 10. But the notion that evidence of involvement in product development by attorneys and liability-minded engineers supports plaintiffs' infringement claim is spectacularly perverse. Even if voluntary compliance were not an affirmative aim of the Copyright Act (which it plainly is), it is neither desirable nor realistic to believe that, given the law's strict liability provisions, companies like Cablevision would develop products in ignorance of the law's requirements. The Turner Plaintiffs do not -- and cannot responsibly -- advocate such an approach to product development.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for summary judgment should be denied.

Respectfully submitted,

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